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Supreme Court of the United States

OCTOBER TERM, 1930

No. 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA,

Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Appellees.

BRIEF OF COUNSEL FOR APPELLEES

E. A. HANSBARGER,
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BRIEF OF COUNSEL FOR APPELLEES

ADDITIONAL STATEMENT OF FACTS

The State proceeding involved in this case is a judgment creditors suit brought under the authority of Section 7, Chapter 139, of the Code of West Virginia. The text is set out in full in the Appendix.

By reference to the statute it will be seen that this is not a suit to enforce only plaintiff's judgment, but a suit instituted on behalf of the plaintiff and all other lienholders. It is a general creditors suit. It is the only form of creditors suit authorized by the

laws of West Virginia except suits to settle estates of deceased persons, which suits may be brought by creditors who have not reduced their claims to judgment. Judgments may be obtained after the bill is filed, and even after the Commissioner in Chancery's report has been filed, and proven in this suit. No lien is obtained by the filing of the bill. Each judgment is a separate lien, taking priority as of the date of rendition. The bill, pursuant to the statute, alleges exhaustion of the personal property and prays ascertainment and subjection of all the real estate of the corporation. It is a winding up proceeding in which disposition and distribution of all the bankrupt's property is to be made pursuant to the State law, which law is very materially at variance with the Acts of Congress governing disposition of the property of bankrupts.

Unfortunately appellants have gone outside the facts set forth in the certificate and averred that the State Court had "placed them in custody of the real estate" (page 5), and (page 13) "this real estate was in custodia legis, the actual custody of appellants," etc., and again (page 6) they aver that they had assumed the duties of and executed the Commissioners' bond and had the real estate in custody when the judgment debtor filed its voluntary petition in bankruptcy.

These erroneous assertions compel us to go beyond the certificate and into the original record to show the facts, which are as follows:—

On July 17th, 1928, eighteen days before the Corporation was adjudicated a bankrupt, a decree was entered by the Circuit Court of Mingo County

adjudging the amounts of the liens and their priorities and directing the Corporation to pay the same within thirty days from the rising of the Court. In case of default the decree provided that the property be sold and appellants were, in that event, to sell the property. But before taking any steps to sell the property they were, pursuant to the terms of the statute, required to qualify by giving bond. They did not give bond until September 20th, on which date the Trustee in Bankruptcy had had possession, with a custodian in charge on the premises, for exactly thirty days. Prior to the time the Trustee took charge the property was in the actual custody and control of the corporate officers and agents. It will be observed that the earliest date upon which the appellants could have qualified is August 17th, which is thirteen days after the Corporation was adjudged a bankrupt.

ARGUMENT

ANY PROCEEDING PENDING IN A STATE OR FEDERAL COURT WHICH HAS SOLELY, OR PRIMARILY, AS ITS OBJECTIVE A GENERAL DISPOSITION AND DISTRIBUTION OF THE PROPERTY OF A PERSON OR CORPORATION WHO BECOMES A BANKRUPT, IS SUPERSEDED BY THE ADJUDICATIN OF BANKRUPTCY AND THE EXCLUSIVE RIGHT TO ADMINISTER THE ESTATE, IN ACCORD WITH THE ACTS OF CONGRESS RELATING TO BANKRUPTCY, PASSES TO THE FEDERAL COURTS SITTING IN BANKRUPTCY.

Constitution, Article 1, Sec. 8. Bankruptcy Act, Sec. 2, first paragraph. Bankruptcy Act, Sec. 2, sub-div. 15, and last paragraph Sec. 2; and cases cited throughout this brief.

Because appellants in the court below rested their case upon Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, and Pickens v. Dent Roy, 187 U. S. 177, 47 L. Ed. 128, and will undoubtedly do so in this court, we believe it advisable to immediately distinguish the facts of those cases from the facts of this case.

Metcalf vs. Barker differs from the case at bar in the following particulars:—

1. It was not a general creditors bill. It was a suit by a single plaintiff to set aside an alleged fraudulent transfer of real estate. Neither title nor posession were in the bankrupt. Both were with the fraudulent transferee.

2. In a suit of such character a lien is obtained by the filing of the bill.

3. The bankruptcy act was passed after the institution of the suit; and when it was enacted there was **no jurisdiction** given to entertain suits to set aside fraudulent conveyances; that jurisdiction was given later; it exists now and is only **concurrent**, not exclusive, (Sec. 70-e), whereas the jurisdiction to **adminster** the property of bankrupts is **exclusive.**

4. Before the passage of the bankruptcy act the debtors had, in another suit in the same court, procured the appointment of Receivers who had been in charge of all of their property not fraudulently transferred for more than two and a half years

before the adjudication of bankruptcy and more than eighteen months before the passage of the act.

5. The transfers were finally held to be fraudulent only as to the plaintiff; "as to all other persons they were (until impeached in proper action) valid." Thus, subject only to the lien of Metcalf Brothers, title to and possession of the property **remained** with the transferees.

In the case of Tennessee Marble Co. (No. 827) in the District Court of the United States, at Knoxville, Judge (the late Justice) Sanford had this to say with respect to the distinction between the proceedings in Metcalf v. Barker and a general creditors bill:—

> "While, as was held by the Supreme Court of the United States in Metcalf Bros. v. Barker, 187 U. S. 165, 174, the validity of proceedings in other courts for the enforcement of specific liens obtained through legal proceedings more than four months prior to the filing of the petition in bankruptcy, is recognized by Section 67-f of the Bankruptcy Act and the jurisdiction of such other courts in such proceedings is not superseded, and while such suits may clearly be proceeded with to their termination without impairing the jurisdiction of the bankruptcy court in the general administration of the bankrupt's estate, obviously this is not the case when the proceedings in such other court have for their object the entire winding up of the bankrupt's affairs."
>
> "Manifestly such court and the bankruptcy court cannot both proceed with the general administration; one or the other must have priority. Therefore, as the bankruptcy court is the only court which can fully administer the estate

in accordance with the bankruptcy act, no other court having authority, for example, to avoid preferences denounced by that act, and the creditors having in no other court the right to participate in the administration of the estate through creditors' meetings as provided by the bankruptcy act, it follows that if the provisions of the bankruptcy act are to be enforced, the bankruptcy court must of necessity upon the adjudication in bankruptcy, acquire an exclusive jurisdiction for the administration of the estate which supersedes the general jurisdiction of any other court in general proceedings that would otherwise inevitably conflict with the bankruptcy proceedings and bring about a winding up of the bankrupt's affairs in a manner different from that provided by the bankruptcy act."

Pickens vs. Dent Roy, a case arising in West Virginia, was also merely a suit to set aside a fraudulent conveyance. In West Virginia **a lien is acquired by the filing of such a bill.** Gilbert vs. Peppers, 65 W. Va. 355, 64 S. E. 361; Wildasen vs. Long, 74 W. Va. 583, 82 S. E. 205. The bill was filed nine years before the passage of the Bankruptcy act. A receiver had been appointed. The trustee in bankruptcy filed a petition in the suit asking the Circuit Court to proceed to final adjudication and enforcement of plaintiff's lien; the bankrupt filed in the District Court a bill for an injunction; his right to maintain said bill after being adjudged a bankrupt was denied. The State court at that time had **exclusive jurisdiction** of suits to set aside fraudulent conveyances. And, as heretofore stated, even now its jurisdiction in that respect is concurrent with that of the Bankruptcy Court. Both title and posses-

sion of the property were vested in the transferee.

In neither Metcalf vs. Barker nor Pickens vs. Dent Roy did the enforcement of the liens result in a distribution contrary to the Bankruptcy Act.

In the West Virginia case of Graham Manufacturing Co. v. Davy Pocahontas Coal Co. (238 Fed. 488) the Circuit Court of Appeals for the Fourth Circuit held that the jurisdiction of the Court of Bankruptcy was paramount and exclusive, notwithstanding the fact that an identical judgment creditors suit had been pending for more than four months, where the appointment of a receiver on the ground of insolvency occurred within four months of the filing of the petition in bankruptcy. That was held to be an act of bankruptcy of which the creditors could take advantage, and that when an adjudication followed, the jurisdiction of the State Court ended. Can it alter the case because an adjudication of bankruptcy occurred in the instant case through the voluntary act of the Corporation? On the authority of the above case and of Re Watts and Sachs, (23 S. C. R. 717) we submit that it does not. In the case of Re Watts and Sachs this court said:—

> "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of Federal courts in bankruptcy, **when properly invoked**, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

Is not the jurisdiction of a court of bankruptcy as "properly invoked" by the filing of a voluntary

petition in bankruptcy by the corporation as by the filing of an involuntary petition by creditors? An answer in the affirmative seems to us the only possible answer. If the insolvent corporation **may not defeat** the operation of the bankruptcy law by **going** into the **State court** to be wound up, is it also to be **prevented** from going into the **Bankruptcy Court** to be wound up? In the Watts case it was the corporation that went into the State court and the creditors who went into the bankruptcy court and compelled the relinquishment by the State court so that they might have the benefits of the bankruptcy law. In this case it is certain creditors who seek to uphold the jurisdiction of the State court and to defeat the jurisdiction of the court of bankruptcy, thereby securing for themselves illegal preferences and also displacing the priority claims of workmen for wages. It was to avoid this result that the Corporation filed a voluntary petition.

Had the Corporation not filed a voluntary petition creditors could unquestionably have obtained an adjudication in involuntary proceedings based upon the many judgments rendered within four months and failure to pay the same within thirty days, as well as upon the preferences effected by the State court decree of July 17th ordering payment of said judgments in date order. Again it will be noted that appellants claim for themselves the status of Receivers, by virtue of the decree of July 17th, 1928. If their contention is correct, then this was a further act of bankruptcy of which the creditors could have taken advantage. Would it not be an anomolous thing if, having granted an adjudication upon these

grounds, the bankruptcy court should then be left powerless to prevent the consummation of the very preferences which were the basis of the adjudication? We are unable to see how the status is altered because the adjudication was made on a voluntary petition. Surely, since an adjudication of bankruptcy had already occurred upon a voluntary petition, to have instituted involuntary proceedings would have been futile and vexatious. In fact, we believe a decree of former adjudication would have been sustained. We submit that it was the right, and in fact the duty, of the corporation to protect its creditors against illegal preferences and to extend to its workmen and other employees the priority given to them by the Acts of Congress, and that it would be unreasonable to hold that the creditors were deprived of their rights because the corporation made it unnecessary, if not impossible, for them to obtain an adjudication upon an involuntary petition.

In the carefully considered opinion written by Judge Dayton in Re Grafton G. & E. Co., 253 Fed. 668, the District Judge, referring to the court's opinion in the case of Graham Mfg. Co. v. Davy Pocahontas Coal Co., says:

> "In the Graham case it is held, if I interpret aright, immaterial how long the State court suit has been pending, but in the exceptional case where one is sought to be forced into involuntary bankruptcy alone on the ground of the appointment of a receiver such appointment must have been within four months, because the act requires some act of bankruptcy to have been committed within four months before involuntary proceedings can be maintained at all No

such condition can ever arise in a voluntary proceeding; therefore, in such cases, I am constrained to believe the "four months period" has no relevancy whatever."

We find absolutely nothing in the statute, **express or implied**, which says that when bankruptcy occurs a State court proceeding which has for its object the general enforcement of liens and distribution of the bankrupt's property in accordance with State laws, may continue because commenced more than four months before the adjudication of bankruptcy. Clearly, the statute, Section 67-c, recognizes the **validity** of liens obtained by **pending** legal proceedings commenced within four months. And Sec. 67-f makes **judgments** not obtained within four months **valid liens.** But the existence of an ordinary judgment at law, obtained in a proceeding previously terminated, surely could not deprive the court of jurisdiction; otherwise the mere rendition and recordation of any ordinary money judgment for a period of four months would prevent the court of bankruptcy from taking jurisdiction of the bankrupt's property. While, as heretofore stated, no lien was obtained by the institution of the suit involved in this case, it may be worth while to note that although Sec. 67-c, by implication, preserves liens obtained by legal proceedings pending at the time of the adjudication, it does not **say or imply** that the court of bankruptcy may not **administer** the property of the bankrupt. By implication it is said that such liens, if **not** obtained within four months, are **not** voided. There is nothing in the statute, as we read it, which implies that a court of bankruptcy may not

restrain **administration** by a state court even when a lien has been obtained more than four months before the adjudication of bankruptcy **by the filing of the bill or the levy of an attachment** in a proceeding then pending; and surely no such implied meaning should be given to the statute if it results in permitting the State court to administer generally the property of the bankrupt pursuant to State laws which are plainly contrary to the express terms as well as the spirit of the Acts of Congress. A creditor holding a lien not avoided by bankruptcy would have the "reward of his diligence" through recognition of his lien by the court of bankruptcy. In a case where a plaintiff had attached property to enforce a right of action and the enforcement of the lien did not result in administering the property contrary to the Acts of Congress, the State court, with the permission of the court of bankruptcy, would no doubt be allowed to sell the property. Such a situation would be a case calling for exercise of the inherent discretionary power of the Bankruptcy Court, which power, as a court of equity, it unquestionably has. If the lien were inchoate and perfection depended upon the successful prosecution of the plaintiff's action, of course, the plaintiff, upon perfecting his lien, would be accorded the benefit of the same in any event. Appellants now concede (page 22) that there is no statutory provision covering "the four months interval". Nevertheless, they contend that by the decisions of this court in Metcalf v. Barker and Pickens v. Dent Roy, this court established a time limit within which adjudication of bankruptcy must have occurred in order to defeat the State court's jurisdiction in the

case now before the court. We think an analysis of these cases shows that they do not establish any time limit within which proceedings in bankruptcy must be instituted in order to prevent a State court from administering the estate of a bankrupt in a general creditors suit, pursuant to the State laws, which are in plain contravention to the provisions of the Acts of Congress relating to bankruptcy. All that those decisions amount to, as we see matters, is this: On the facts of those two cases the court held that the liens which had been acquired by the pending proceedings were not invalidated by the subsequent adjudication of bankruptcy, but, as heretofore stated, those were suits to set aside fraudulent conveyances, of which the Bankruptcy Court had, at that time, no jurisdiction at all, and of which it has today only concurrent and not exclusive jurisdiction. Furthermore the enforcement of the State court's decrees in those cases did not result in a distribution of the property of the bankrupts contrary to the terms of the Acts of Congress.

In an exhaustive opinion in the matter of Tennessee Marble Company, (Knoxville), Case No. 827, the late Justice Sanford, (then District Judge), in sustaining an injunction against the further prosecution of a creditors suit said:—

> "It is true that in some of the decisions in which insolvent proceedings in the State courts have been held to be terminated by an adjudication in bankruptcy, the decision has been based upon the fact that the receiver has been appointed in such insolvency proceedings within four

months preceding the filing of the bankruptcy petition; and in others upon the ground that the appointment of a receiver in such insolvency proceedings was a specific ground upon which the subsequent adjudication in bankruptcy was made (1 Remington on Bankruptcy, ss. 1602, 1603, P. 996; Loveland on Bankruptcy (3rd ed.) ss. 23, p. 117; Collier on Bankruptcy (7th ed.) ss. 23b, p. 418; and cases cited). Most of these decisions were rendered, however, before that in the Watts case, and any implied limitation of the general rule to such specific cases is, I think, inconsistent with the broad principles of the paramount jurisdiction of the bankruptcy court stated in the opinion in that case. **** I rest my opinion in this case upon the doctrine stated by the Supreme Court in the Watts case, that the bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive,' and the broad principle that such paramount and exclusive jurisdiction of the bankruptcy court **necessarily terminates the jurisdiction of any other court in prior proceedings of like character for winding up the estate of the bankrupt, which are necessarily inconsistent with the administration of the estate by the bankruptcy court and incompatible with the discharge of the duties of the bankruptcy court under the Bankruptcy Act."**

Justice Sanford then quotes from Re. Hecox (C. C. A.) 164 Fed. 823, 825, as follows:

"The scheme as well as the policy of the bankrupt act is that the collecting, marshalling, administration, and distribution of the bankrupt's estate shall reside exclusively in the court of bankruptcy."

Justice Sanford next quotes from Re. Smith, 92 Fed. 135, as follows:

"The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency if the State court, proceeding under our state insolvent laws, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final distribution among those entitled to participate therein, leaving to the court nothing but the adjudication of bankruptcy and the discharge of the bankrupt. Such a construction is inadmissible because it would render inoperative numerous express provisions of the bankruptcy act. **** The Bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; **** to have liens and preferences governed by it. **** In my opinion, the operation of the State law is suspended, and the State courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents ****. The jurisdiction of the bankruptcy court is supreme; it is exclusive and the acts of the State courts are unauthorized and void, because jurisdiction over the person and estate of the bankrupt is drawn to, and vested exclusively in, this court by the adjudication of bankruptcy."

Justice Sanford also quoted from Re. Whipple, 6 Biss. 516, Fed. Case No. 17, 512, in which it was held:

> "Proceedings in bankruptcy superseded a creditors' bill in a State court, and the receiver appointed by the State court could be compelled to deliver the property to the assignee in bankruptcy, subject to all rights or priorities which the creditors whom he represented had obtained by their diligence."

In that case the court said:

> "It seems utterly impossible to carry on the two administrations together; the estate should be administered in one court, and I think the bankrupt court the proper one. **** And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to priorities which are obtained by any creditor by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained."

Justice Sanford cites other Federal decisions; also decisions of State Supreme Courts as follows:

> "In the case of Mauran v. Carpet Lining Co., 6 Am. Bankr. Rep. 737, 23 R. I. 324, 50 Atl. 331, the Supreme Court of Rhode Island said:
>
> "The plenary and paramount power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States," says Hall, J., in Re Deposit Savings Inst., Fed. Cas., No. 12,221, p. 141, is given in express terms by the Constitution of the United States. It is therefore very clear that when Congress has

exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the States over the same subject matter; and that whenever any State legislation, or any action of the State courts, comes **practically** into actual conflict with the proper execution of the laws of Congress, constitutionally passed under such grant of power, State legislation and the jurisdiction and action of the State courts must yield to the paramount authority of the national government.'

"The object and intent of the national bankruptcy law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the Federal Courts sitting as courts of bankruptcy ****'."

He then quoted from the case of Herron Co. v. Superior Ct., 8 Am. Bankr. Rep. 493, 136 Cal. 279, Pac. 814, 89 Am. St. Rep. 124, in which the Supreme Court of California said:

"The provision in the Constitution of the United States conferring upon Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States, of necessity makes any act of Congress passed upon the subject the supreme law of the land, and it was at a very early day determined that the effect of such action of Congress is to suspend and supersede the operation of any State law of insolvency whenever there is a conflict between the two. There can be no concurrent jurisdiction in the two sovereignties over the same subject, and, as the people of the several States have yielded to the United States the power to enact laws upon this subject, it follows that when the United States has enacted a law the power of the State to enforce its own law upon that subject, whether it be similar or dif-

ferent, must yield to what is the supreme law of the land."

From Loveland on Bankruptcy (3rd ed.) Sec. 23, P. 116, Justice Sanford cites the following:

"But where the possession of the state court would have the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may seize such property for the purpose of administering it in accordance with that law. The reason for this is that the bankruptcy law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts. In this respect the state courts have not concurrent jurisdiction with the courts of bankruptcy, and the general rule of comity has no application. The bankruptcy law is paramount and should not be defeated by proceedings in a state court."

And from 1 Remington on Bankruptcy, Sec. 1625, P. 988, Justice Sanford cites the following:—

"The third exception to the rule that the state court retains jurisdiction if first in possession of the res, is where the property at the time of the bankruptcy is in the custody of a State court under State insolvency or State Bankruptcy proceedings, or proceedings amounting to such, in which event proceedings are suspended by the Federal bankruptcy proceedings."

In closing his opinion, Justice Sanford said:—

"I have reached the conclusions stated in this opinion after most careful consideration, with a deep sense of the importance of the question involved."

In the case of Bailey vs. Blackmon, 14 Fed. (2nd) 16 (CCA 4th) the court, speaking through

Judge Waddill, said that a court of bankruptcy,

> "May stay proceedings in a State court begun prior to proceedings in a bankruptcy and, indeed, stay the taking of any steps embarrassing to the equitable distribution of the estate of the bankrupt."

In the case of Bank of Dillon vs. Murchison, 213 Fed. 147, (CCA 4th) the court said:—

> "The bankrupt law being supreme and the District Judge of the United States being constituted the especial judicial expounder of it, the responsibility is primarily upon him to determine, in each case, whether its administration shall be shared with another. His discretion in the premises will be rarely reviewed unless abuse of it is clearly shown." Citing New River Co. vs. Ruffner, 165 Fed. 881; Va. I. C. & C. Co. vs. Olcott, 197 Fed. 730.

In the same case the court said:—

> "The bankrupt law is supreme and its practical and plenary administration is more and more demonstrating the fact that it must, to a very great extent, be exclusive."

The soundness of this pronouncement had apparently become even more evident by the time the court decided the case of Bailey vs. Blackmon, supra, wherein there was pronounced the broader, and in our opinion, salutary doctrine that,

> "While the rules with respect to comity between courts shall be respected where the same can be done without violence to the bankrupt and its creditors, nevertheless the jurisdiction of the bankruptcy court in the administration of the affairs of insolvents **is exclusive of all other courts.**"

While in the case of U. S. F. & G. Co. vs. Bray (225 U. S. 205, 32 S. C. R. 620) this court was dealing with a suit brought after an adjudication of bankruptcy had taken place, we think certain expressions in that opinion are pertinent. After citing various sections of the Bankruptcy Act, Justice Van Devanter said:—

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estate to money, its distribution, the determination of preferences and priorities to be accorded to claims presented for allowance and payment in the regular course, and supervision and control of the trustees and others who are employed to assist them."

The point was made that the suit (pending in the Federal Circuit court) was brought with the express leave of the Court of Bankruptcy and that for that reason it should not be stayed. On that subject Justice Van Devanter said:—

> "Of the fact that the suit was brought in the Circuit Court with the express leave of the Court of Bankruptcy, it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or confide them to another tribunal."

In the case of Griffin v. Lenhart, 266 Fed. 671 (CCA 4th), cited by appellants, the lien involved was acquired by the levy of an attachment issued in

conjunction with an ordinary action at law for the recovery of a debt evidenced by negotiable notes. "Non-residence" was the ground upon which the attachment was issued and only by levying the attachment upon the property of the defendant did the court obtain jurisdiction and only by preservation of the levy could the court retain its jurisdiction. While it is evident that that proceeding was in no sense a general creditors suit, nor winding up suit, there are some statements in the opinion, written by the late Judge Woods, which may be pertinent to a consideration of the question involved in this case. In that case Judge Woods said that the apparent conflict in the decisions of the Circuit Courts of Appeal is all due to a failure to note the distinction between cases where a lien is obtained **by virtue of the pending** proceeding and cases where no lien is obtained by the pending proceeding. He said, further, that on careful analysis it will turn out that the decisions are "entirely consistent with each other" and that the distinction is this:

> "Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and **in which** creditors have acquired liens on the property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the State court without interference from the court of bankruptcy."

In the opinion Judge Woods discusses Commercial Trust and Savings Bank v. Bush-Grace Company, 228 Fed. 300 (CCA 6th), which involved a creditors suit instituted more than four months

before the filing of the petition in bankruptcy, saying:—

> "The State court had ordered a reference to ascertain creditors, but had not taken custody by a receiver or otherwise of the property when the petition in bankruptcy was filed June 2nd, 1915. It was held that the bankruptcy court had exclusive jurisdiction, for the distinguishing reason that the **proceedings** in the State court, under the law of Tennessee, **did not constitute a lien**: that there was no prior lien and no custody of the property by the State court. Thus the court expressly distinguished the case from that of Pickens vs. Roy and Metcalf vs. Barker."

The same distinction was recognized by the Circuit Court of Appeals of the Sixth Circuit in the case of Miller vs. Potts (1928) 26 Fed. (2nd) 851. Under the law of Tennessee when a creditors suit is instituted no lien is thereby created until after the court has sustained a motion to make it a general creditors bill. And this is true whether the creditors have judgment or not. To have it made a general creditors bill it is necessary that there be a showing of insolvency. After that is shown the court enters an order making it a general creditors bill which creates a lien for the **equal benefit** of all creditors. In that case on September 14th, 1926, a motion was made to "sustain the bill as a general creditors bill", which was denied. Nothing further was done until May 3rd, 1927, when a supplemental bill was filed and a motion made to sustain the bill as a general creditors bill. That motion was sustained on May 14th, 1927, and at the same time a receiver was appointed. On June 1st, 1927, an involuntary peti-

tion in bankruptcy was filed. On application being made to the State court to surrender the property it declined to do so. Thereupon an application was made to the United States District Court for an order on the receiver requiring him to surrender the property, which was granted. On appeal the holding of the District Court was affirmed. Discussing the contention of appellant the court said in its opinion:—

> "But appellant urged that under the original bill, filed ten months before the bankruptcy petition, a valid lien for all creditors was obtained and the State court, which the took control of the property to effectuate that lien, cannot be ousted of jurisdiction, possession or control. **If the bill was such that a lien was thereby then acquired, the contention would be sound.** Blair vs. Brailey (CCA) 221 Fed. 1; Cf. Graham Mfg. Co. vs. Davy Poca. Coal Co. (CCA 4th) 238 Fed. 488."

Where the filing of the bill has created a lien and such lien is more than four months old it is expressly preserved by the terms of Section 67-c. Under such circumstances disposition of the property is made pursuant to, and not contrary to, the Bankruptcy Act. And where the lien is for the equal benefit of all creditors, it is also within the spirit of the Act. The filing of the bill in the instant case did not create a lien and there was no subsequent order creating a lien for the equal benefit or all creditors and no such order could have been entered under the provisions of our statute, (Sec. 7, Ch. 139, 1923 Code). Only by the appointment of a Receiver can a general lien for the equal benefit of all creditors be established in West Virginia and, when that is done, it is effective only against judgments ob-

tained after the appointment. All judgments taken up to the time of the appointment retain their priority in date order.

In Griffin vs. Lenhart the attachment was levied only upon part of the debtor's property and, as stated, the main action was one of assumpsit. We do not contend that an attachment proceeding which is ancillary to an action at law or to a suit in equity to recover a debt should necessarily be stayed, because neither the main action nor the attachment has for its objective the general administration of the property of the bankrupt and the attachment is inchoate and dependent upon the successful prosecution of the main action. However, if after the successful prosecution of the main action and the perfecting of the inchoate lien, the enforcement of the perfected lien materially embarrasses the court of bankruptcy, or results in a distribution of the property of the bankrupt contrary to the provisions of the Acts of Congress, we contend that the court of bankruptcy has both the power and the duty to stay **enforcement** of the lien and to take over the administration of the property, giving proper recognition to the perfected lien. In actual practice, this takes place constantly, particularly with respect to attachments and distress levies obtained before Justices of the Peace, which attachments and levies, when regular, are given their proper priority by the Referee like all other liens; and in actual practice similar attachments in the Circuit Court are so managed, without challenge, thus avoiding dual administration, with its consequent embarassment to and conflict with the bankruptcy

court. But if the contention of appellants is sustained the bankruptcy court will be continually embarassed by separate administrations even down to attachments and distress warrant proceedings of Justices of the Peace. It may be conceded that in occasional instances it might be deemed expedient for the court of bankruptcy to permit the State court to dispose of property. For instance, where the proceedings have been almost terminated and the enforcement of the decree and the distribution of the money **does not violate any of the provisions of the Acts of Congress relating to bankruptcy.** But to permit the State court to administer the estate after bankruptcy, **in accordance with the State law** and **in total disregard** of the priorities and order of distribution prescribed by the bankruptcy statutes, we submit, nullifies both the Constitution and the Acts of Congress. In this particular case under the State statute:

> All judgments, regardless of date, are liens and take priority by date of rendition. Section 67-f avoiding judgments obtained within four months is made a nullity. Section 60 is also nullified.
>
> The priority given to workmen, clerks and traveling salesmen by Section 64 is likewise nullified.
>
> Creditors are deprived of the right to participate in the administration of the estate. The loss of this right is of great importance in a case involving an estate of the character and value of this estate.

Unfortunately the certificate of the Court of Appeals omits many facts which we think are per-

suasive. However, we assume it is proper to submit the following as possible additional situations which may arise or exist when an adjudication of bankruptcy occurs and the Federal Court is denied the right to enjoin the prosecution of a creditors suit.

1. A case where the estate is an industrial plant situate in two States, on adjoining lands, with all the raw materials in one State on leased lands, with interdependent parts of the plant, equipment and buildings in each State, and with the only available railroad not located in the State in which the raw materials are, and accessible only by crossing the lands owned outright by the bankrupt in the other State.

2. Where some of the liens attach to property in one State, some to property in the other State, and some to property in both States.

In such a situation what court is there that can effectively, economically, without sacrifice of the property and with such speedy justice administer the estate? Only the Court of Bankruptcy has the power to sell all of the property in both States at one time, and the power and machinery to promptly and economically marshal all of the liens and administer the estate promptly and equitably. (Robertson v. Howard, 229 U. S. 254; 33 S. C. R. 854).

We assume that in presenting our case it is also fair to consider along with the other actualities, which are treated above as possibilities, the fact that the Trustee in Bankruptcy might be lawfully and properly in actual possession of the property. Under this court's decision in the case of Harkin v. Brund-

age, 276, U. S. 36, 48 S. C. R. 268, existence of this situation, we think, might alone, and without reference to anything else, confer upon the Bankruptcy Court the right to enjoin any act of others affecting the possession or title of the Trustee in Bankruptcy. In citing this case as authority for their position appellants ignore the fact that this court directed the return of the property to the State Court Receiver because possession was fraudulently obtained by the Federal Receiver.

Although we have read all of the cases cited by appellants, we have not undertaken to discuss all of them in this brief because we know that upon reference to them this court will very quickly see that they are not applicable to this case. We wish to call attention, however, to the case of Abney-Barnes Co. v. Davy Pocahontas Coal Co., 83 W. Va. 292, 98 S. E. 298, in which it is apparent that careful consideration was not given to the question involved in this case and it was decided before the Circuit Court of Appeals passed on the same question in the case of Graham Mfg. Co. vs. Davy Pocahontas Coal Co., supra.

In the Circuit Court of Appeals and throughout their brief in this court appellants have proceeded upon the theory that the jurisdiction of the State Court and the Federal Court is concurrent. We respectfully submit that this is an erroneous theory and that, in fact, upon an adjudication of bankruptcy the Court of Bankruptcy acquires exclusive jurisdiction over the property of the bankrupt, and that it may enjoin any proceeding pending in a State court, having for its purpose, or resulting in, the adminis-

tration of the property of the bankrupt in accordance with State laws; or any proceeding which obstructs it in the performance of its duty to administer the estates of bankrupts pursuant to the Acts of Congress relating to bankruptcy.

As heretofore stated, we concede that there may be cases when from both a practical and equitable standpoint it is neither necessary nor advisable to enjoin proceedings pending in a State court. By the terms of Section 2 of the Acts of Congress relating to bankruptcy and through its inherent power as a court of equity, the Bankruptcy Court may, and undoubtedly will, exercise discretion in granting or refusing injunctions, and its rulings will be reviewable in cases of abuse. But as matters stand now the right to grant an injunction at all is denied and it is respectfully submitted that until this court definitely re-affirms that upon an adjudication of bankruptcy Courts of Bankruptcy acquire exclusive jurisdiction over the property of bankrupts, there will be no end to the numerous and continually recurring cases of alleged "conflict of jurisdiction". So long as there is supposed "concurrent jurisdiction" this issue will remain a live one.

Respectfully submitted,

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Counsel for Appellees.

APPENDIX

§ 7. Suits to enforce judgment; parties; notice to lienholders; sales of real estate; distribution of proceeds.—The lien of a judgment my be enforced in a court of equity after an execution of fieri facias thereon has been duly returned, to the office of the court or to the justice from which it issued, showing by the return thereon that no property could be found from which such execution could be made; Provided, That such lien may be enforced in equity without such return, when an execution or fieri facias has not issued within two years from the date of the judgment. If it appear to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment. In every such suit all persons having liens on the real estate sought to be subjected by judgment or otherwise, shall be made parties, plaintff or defendant, or if the number of such persons exceed ten the suit may be brought by any one or more of them, for the benefit of himself and such other lien holders as will come in and contribute to the expenses of the suit. And whether the suit be so brought or not, every such lien holder, whether he be named as a party to the suit or not, or whether he be served with process therein or not, may present, prove and have allowed any claim he may have against the judgment debtor, which is a lien on such real estate, or any part thereof, and from and after the time he presents any such claim he shall be deemed a party plaintff in such suit. No decree for the distribution of the proceeds of such real estate shall be made until a notice to all persons holding liens on the

real estate of the judgment debtor be posted and published, under a decree of the court, as hereinafter provided. Such notice shall be sufficient if it be to form or effect as follows:

To all persons holding liens by judgment or otherwise, on the real estate, or any part thereof, of A.....B.....:

In pursance of a decree of the circuit court of.....county, made in a cause therein pending, to subject the real estate of the said A..... B.....to the satisfaction of the liens thereon, you are hereby required to present all claims held by you and each of you against the said A..... B....., which are liens on his real estate, or any part of it, for adjudication to me, at my office in the county (or city, town or village, as the case may be), of....., on or before the.....day of.....

Given under my hand this....day of.....

C..... D....., commissioner.

Such notice shall be published once in each week, for four successive weeks, in some newspaper printed in the county, or if none be printed therein, in some newspaper of general circulation in the county, and posted at the front door of the court house of such county at least four weeks before the day mentioned in the notice; and such publishing and posting of such notice shall be equivalent to the personal service thereof on all persons holding liens on any such real estate, unless the court shall in the decree directing such notice to be so published and posted otherwise order. The commissioner to whom the case is referred by such decree shall, as soon as possible after the said notice is published and posted as aforesaid, or served in such manner as the court may order, proceed to ascertain and

report all the liens on the real estate or any part threof of the judgment debtor, the holders of such liens, the amount due to each, and the priorities thereof, and such other matters and things as the court by its decree may direct, and the same proceedings shall be had on such report as in other suits in chancery. When the report of such commissioner is confirmed, if the claims therein reported (if any) be not paid, the court shall decree that the real estate of the judgment debtor, subject to such lien or liens, so far as may be necessary, shall be rented or sold, and the proceeds thereof distributed among the several lien holders who have appeared and proved their liens and claims, according to their several priorities (if any); which decree shall be a bar to the claim of any lien holder who has not appeared and presented his claim to said commissioner, as required by said notice, except that if a surplus remain after the payment of the claims so presented and proved, and confirmed by the court, the lien holder so failing to appear may share in such surplus, upon proving his claim at any time before a final decree in the case, in such manner as the court shall direct. But if he fail to present his claim before such final decree, he shall be forever barred of all right to participate in the proceeds of such real estate so far as the other creditors of said judgment debtor, holding liens on his real estate, who have not so failed, are concerned, and so far as the creditors at large of such judgment debtor are concerned. If pending any such suit, a judgment at law be recovered by any person against such judgmen. debtor, such person may present his claim to the commissioner and have it adjudicated and allowed in the same manner and to the same extent as if the judgment had

been obtained before the institution of such suit. And he may present such claim to the court after the report is made, and before the entering of a decree distributing the proceeds of the sale of such real estate, and have the same adjudicated and passed upon by the court, and if found to be correct and a lien upon such real estate, the court shall allow and confirm the same, and provide for the payment thereof in the decree of sale and distribution. If after the commencement of such suit, any lien holder commence any other suit or proceeding in or out of court to enforce a lien claimed by him on the real estate, or any part thereof, of the judgment debtor, upon which a lien is sought to be enforced by such suit, the court, or the judge thereof in vacation, may enjoin him from so doing, and require him to come in and assert his lien in such suit, or make such order or decree in relation thereto as to such court or judge may seem right and proper to protect the interest of all parties having liens. (Acts 1872, c. 30; 1882, c. 126; 1891, c. 95.)

EXCERPTS CITED FROM ACTS OF BANKRUPTCY

§ 2. That the courts of bankruptcy as hereinbefore defined, namely, the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories **and possessions to which this Act is, or may hereafter be, applicable,** and the United States court in the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as

will enable them to exercise original jurisdiction in bankruptcy proceedings, ****

§. 2. (15) make such orders, issue such such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; ****

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

§ 67. c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefitted thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

§ 67. f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.